Appendix F (Part 3)

***The Bank of New York Mellon v. Jefferson Cnty., Ala.*, No. 2:08-cv-01703**
Memorandum Opinion
(N.D. Ala. June 12, 2009)

Second, as the County observes, although Plaintiffs purport to be concerned about the speed with which a state court might act, the question remains: Relative to what? If this court were to grant Plaintiffs' emergency motion, the County would have an immediate appeal as of right to the Eleventh Circuit. *See* 28 U.S.C. § 1292(a)(2). That appeal, realistically, would take months. Of course, the losing party in the Eleventh Circuit would presumably petition the United States Supreme Court for certiorari; that process would likely add more time to the litigation (and a good bit more if the petition were granted). Should either the Eleventh Circuit or the Supreme Court agree with the County, on either Johnson Act or abstention grounds, Plaintiffs will end up right back where they should be now – in state court.[28] Further, even if Plaintiffs were to prevail on appeal, once the case returned to this court, it would *still* be in its infancy.[29]

---

[28]Whether a state court remedy is plain, speedy and efficient is determined *not* at the time of dismissal, but at the time when Plaintiffs initially selected their forum. *Henry v. Metro. Dade County*, 329 F.2d 780, 781 (5th Cir. 1964); *Klotz v. Consol. Edison Co. of New York*, 386 F.Supp. 577, 586-87 (S.D.N.Y. 1974) (stating, *inter alia*, that "[t]he availability of a direct action for a declaratory judgment in the state courts is sufficient to satisfy the requirement for a plain, speedy and efficient state remedy..."); *Preston County Light & Power Co. v. Pub. Serv. Comm'n*, 297 F.Supp 759, 766 (D. W.VA. 1969).

[29]To be sure, for all the activity on Plaintiffs' emergency motion, this case has barely progressed past the pleadings. There has been no parties' planning meeting, no scheduling order, only limited discovery, no dispositive motion schedule, and no trial date set. That is not the fault of the parties, but it is a reality. Moreover, Plaintiffs have argued that there has already been delay in their remedy because (1) this case has been allowed to proceed in this court, and (2) Defendants did not raise the Johnson Act issue at an earlier stage in the litigation. There are a number of responses to these concerns. First, Plaintiffs chose to file this suit in federal court. While the Johnson Act defense was recently raised, the Johnson Act was not recently enacted. (Indeed, it has been codified for over seventy years.) Had Plaintiffs chosen to pursue a receiver in a state forum, they would not have had to confront this jurisdictional hurdle. Second, the parties' litigation efforts need not be duplicated in state court. The parties are free to use the discovery and transcripts developed in this case in state court. Third, many of the delays in this case have been caused by the court and parties' desire and efforts to seek a global resolution of this matter. The court makes no apologies for that and certainly does not think that time was wasted, even if the efforts to date have been unsuccessful. Finally, "[t]he fact of the matter is that legal conflicts are not resolved as quickly

Finally, the heart of Plaintiffs' "speed" arguments is ultimately premised on a series of suppositions. Based entirely on the case of *Wilson v. J.P. Morgan Chase, et al.*, CV-08-901907, currently pending in Jefferson County Circuit court, (*see* Doc. #79 at 9-11), Plaintiffs assert that a suit in state court would be plagued by a "virtually certain" mass-recusal of the entire Jefferson County bench. Even assuming such a mass recusal, Amendment 328 to the Alabama Constitution provides a process by which the Chief Justice selects alternate judges. The Amendment's existence (combined with the presumption of regularity) is evidence that a mass recusal would not cause undue delay. Thus, there is already a plain, speedy, and efficient state-law remedy in place to address even Plaintiffs' worst-case scenario. Moreover, there are literally hundreds of state court judges to whom Chief Justice Cobb could assign this case. This case is also distinguishable from *Wilson* in this respect – *Wilson* is a putative class action, which presumptively gives every potential class member a direct pecuniary interest in the outcome and requires judges to be especially sensitive to issues that could lead to recusal or disqualification. As a non-class action, this case does not appear to present that same recusal conundrum.

e. Plaintiffs Cannot Point to a Single Case Where a Receiver With the Power to Affect Utility Rates was Appointed by a Federal Court

To be sure, the court has given Plaintiffs a substantial period of time to research the issue of whether a federal court has ever appointed a receiver with the power to adjust utility rates. At the March 26, 2009 hearing, the following colloquy occurred:

---

as we would like." *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 519 (1981) (holding that a 2-year delay does not justify the conclusion that the remedy is not speedy). Plaintiffs have sought extraordinary relief in this complex case. They cannot reasonably expect to have a receiver appointed over the sewer operations of the largest County in the State without full scale litigation and some level of judicial scrutiny.

Plaintiffs' Counsel:	"Your Honor, there are dozens of cases in which a federal court has appointed a receiver. And the fact that the receiver takes over the county's –"
The Court:	"Any cases you know where a federal court appointed a receiver to affect rates and that was upheld by a court of appeals?"
Plaintiffs' Counsel:	"Your Honor, I don't have a direct answer to that, but we would love to look."
The Court:	"I'm going to give you that chance."
Plaintiffs' Counsel:	"Yes, sir."
The Court:	"And I'm not going to make you do it by the end of the hearing. I'm going to give you some more time than that."

(Tr. of March 26 Hearing at 20-21). After that exchange, the only case Plaintiffs have pointed to is *Warrenville State Bank v. Farmington Township*, 185 F.2d 260 (6th Cir. 1950). As Plaintiffs concede, however, neither the District Court nor the Sixth Circuit *mentioned* the Johnson Act. Indeed, the District Court and Sixth Circuit opinions are both silent with respect to the Act's application. Accordingly, the case is of negligible value; at most, Plaintiffs can speculate on how the courts *might* have ruled if the Johnson Act *had* been considered.

As matters stand now, having accepted the court's invitation, Plaintiffs have been unable to locate a single case in which a federal court appointed a ratemaking receiver in the face of a Johnson Act objection and was affirmed on appeal. Apparently, therefore, Plaintiffs' own research is consistent with the court's analysis: if this court were to appoint a ratemaking receiver over Jefferson County, that would not only be inconsistent with the Act, it would be a first.

"The obligation of [this] federal court is clear from a reading of the Johnson Act. The existence of a remedy in the State court effectively ousts the federal court of jurisdiction, and the

initial suit filed by appellant was properly dismissed." *Henry v. Metropolitan Dade County*, 329 F.2d 780, 781 (5th Cir. 1964) (affirming dismissal even where the time in which the state suit might have been brought had expired). "[T]he legislative history of the Johnson Act supports a broad interpretation of its jurisdiction-limiting effect." *Beechwood Dev'p., LLC v. Olympus Terrace Sewer Dist.*, 2005 WL 2573331, *2 (W.D. Wash. 2005) (citing *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1054 (9th Cir.1991)). Because the court finds that all of the conditions for the application of the Johnson Act have been met, the Johnson Act deprives this of jurisdiction to appoint a receiver with rate-making authority.

C. The Proper Course Is For This Court To Abstain From Deciding Whether to Appoint A Receiver Who Does Not Have Ratemaking Authority

From the very beginning of this litigation, Plaintiffs have pursued the appointment of a receiver with rate-making authority – principally because they want someone to increase sewer revenues (including raising sewer rates) and the County Commissioners are unwilling to do that. Indeed, at the February hearing, before the County had raised its Johnson Act challenge, counsel for the Trustee stated unequivocally that "receivership is *meaningless* until the receiver is *empowered to raise revenue* and cut expenses." (Tr. of Feb. 25, 2009 Hearing at 11 (emphasis added); *see also* Doc. #1 at ¶¶ 57, 59, 62, 64, 69, 74, 82, Prayer for Relief at ¶¶ iii, and iv; Doc. #8 at ¶ 9). And to be clear, even now Plaintiffs clearly desire the appointment of a receiver who would have the power to adjust rates. However, in light of the County's arguments regarding the Johnson Act, Plaintiffs have argued alternatively that, if the court determines that it lacks jurisdiction to appoint such a receiver, the court should appoint a receiver without rate-making authority. Defendants argue that the court should abstain from making such an appointment because rendering a decision would

require the court to decide unsettled issues of Alabama law, something better left to courts of the State of Alabama[30] under traditional notions of federalism and comity.

Principles of abstention evolve from concepts of federalism, and issues of federalism involve some of the most important decisions by federal courts and significant debates in American politics – the boundaries between state and federal power. Indeed, Justice O'Connor has referred to the Supreme Court's responsibility to define the boundaries of federalism – that is, discerning the proper division of authority the Federal Government and the States – as the nation's "oldest question of constitutional law." *New York v. United States*, 505 U.S. 144, 149 (1992). "Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996) (citing *Burford*, 319 U.S. at 332-333 and *Younger v. Harris*, 401 U.S. 37, 44-45 (1971)).[31] When they abstain,

> federal courts, "exercising a wise discretion", restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary ... . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and

---

[30]While Plaintiffs predictably contend the court should not abstain, in addressing that issue, the vast majority of cases they cite for the proposition that this court can award them the substantive relief they seek (*i.e.*, a receiver over the Sewer System) were decided by Alabama *state courts*.

[31]The doctrine of abstention is driven by:

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

> federal authority without the need of rigorous congressional restriction of those powers.'

Burford, 319 U.S. at 332-333 (quoting *Railroad Commission v. Pullman Co.*, 312 U.S. 500, 501 (1941)). Under these principles, a court's "discretion to decline to exercise its jurisdiction [also] may be applied when judicial restraint seems required by considerations of general welfare."*Burford v. Sun Oil Co.*, 319 U.S. 315, 333, n.29 (1943) (quoting *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552 (1937)).[32]

The Supreme Count has recognized a number of interrelated "abstention" doctrines, but they all serve essentially the same purpose – namely, in appropriate circumstances, to defer a decision in federal court in favor of proceedings in a state forum. Each of these abstention doctrines is firmly rooted in principles of federalism. "Where parties have come into federal court for a determination of rights, the federal court should not only stay its hand but should dismiss the action, where there is available in the state courts *a complete and adequate remedy* for the determination of the same questions presented in the federal action." *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1143 (10th Cir. 1974) (emphasis added) (citing *Alabama Public Service Commission v. Southern Ry.*, 34 U.S. 341 (1951)). Of particular import to this court's abstention analysis is the fact that, based upon the court's conclusion that the Johnson Act does not permit appointment of a rate-making receiver, a "complete and adequate remedy" is not available to Plaintiffs in *this* court.[33]

---

[32]To be clear, as discussed *infra*, the court's abstention analysis is based on *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). However, *Burford* abstention is certainly related to - and in some ways - an extension of *Thibodaux*; therefore, the court's citation to *Burford* is appropriate.

[33]While it is indeed an important factor in the court's abstention analysis that the Johnson Act precludes the appointment of a receiver with rate-making authority, the court emphasizes the following point. Even if the court were to determine that the Johnson Act did not divest it of

Defendants argue that the court should abstain under three separate abstention doctrines: *Thibodaux* abstention, *see Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford* abstention, *see Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and *Williams* abstention, *see Pennsylvania v. Williams*, 294 U.S. 176 (1935). However, Defendants' primary argument is that the *Thibodaux* abstention doctrine requires that this court abstain because any decision regarding (1) whether a receiver should be appointed or (2) the scope of such a receiver's duties would implicate unsettled questions of state law.

The policy reasons which undergird federal court abstention are not new. "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Williams*, 294 U.S. at 185. Exercising jurisdiction over Plaintiffs' claims seeking the appointment of a receiver requires the court to consider the issuance of injunctive relief which would necessarily affect the exercise of authority currently vested in the elected officials of the Jefferson County Commission. Plaintiffs have asked this court to place certain authority – management and control of the operations

---

jurisdiction, "it by no means follows from [that] fact ... that such jurisdiction must be exercised in [this] case" as it relates to the appointment of a rate-making receiver. *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 345 (1951). "Frequently one of the abstention doctrines or other considerations of comity will indicate the desirability of leaving the plaintiff to his remedies in the state system even where the Johnson Act does not apply." 17A WRIGHT & MILLER, *supra*, § 4236, at 241. A number of cases fit that pattern precisely. *See, e.g., Southern Ry. Co.*, 341 U.S. at 350 (assuming Johnson Act inapplicable but abstaining in deference to state administrative process); *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 782 F.2d 1236, 1242 (5th Cir.), *amended in part*, 798 F.2d 858, 860-64 (5th Cir. 1986) (holding Johnson Act inapplicable but abstaining); *ALCOA v. Utils. Comm'n of the State of N.C.*, 713 F.2d 1024, 1027, 1030 (4th Cir. 1983) (same). Even if the court had not concluded that the Act bars appointment of a rate-making receiver, it would have in all likelihood abstained on that issue as a matter of comity. *City of Monroe v. United Gas Corp.*, 253 F.2d 377, 381 (5th Cir. 1958); *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1143 (10th Cir. 1074).

of the Sewer System which is currently in the hands of the County Commission – into the hands of a receiver.

Not all cases in which the issue of abstention is raised fit neatly into an existing abstention doctrine. *See Colorado River*, 424 U.S. at 816 (citing *Williams*, *supra*). In evaluating the abstention issue before it in *Colorado River*, the Supreme Court noted that the facts of that case did not fit neatly into any of the traditional abstention doctrines. In those circumstances, it stated "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations" which are appropriate to consider, such as "considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Colorado River*, 424 U.S. at 816 (quoting *Kerotest Mfg. Co. V. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

Before it discusses the specifics of its analysis of whether it should abstain with respect to appointment of a receiver, it is appropriate that the court be clear about a few matters. First, it understands fully that "abstention ... is the exception, not the rule." *Colorado River*, 424 U.S. at 813. That having been said, "[a]bstention doctrines are a significant contribution of the theory of federalism and to the preservation of the federal system in practice. They allow federal courts to give appropriate and necessary recognition to the role and authority of the States." *Quackenbush*, 517 U.S. at 733 (Kennedy, J., concurring). Accordingly, "[t]he duty to take these considerations into account *must* inform the exercise of federal jurisdiction." *Id.* (emphasis added). One key issue here involves "a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action,'" and an inquiry that focuses on whether "the State's interests are paramount [such] that a dispute would best be adjudicated in a state

forum." *Id.* at 728 (majority opinion) (citation and internal quotations omitted). "This equitable decision balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining uniformity in the treatment of an essentially local problem, and retaining local control over difficult questions of sate law bearing on policy problems of substantial public import." *Id.* (citations and internal quotations omitted). With these principles in mind, the court will consider carefully whether it should abstain on the receiver issue. For the reasons explained below, it finds that this is not that close a case. In this diversity case, there is minimal federal interest[34] and the State of Alabama has a very strong interest in having complex questions of its state law decided by its courts – courts that are best equipped to decide them.

1. *The Thibodaux* Abstention Doctrine Counsels In Favor of Abstention

The court now turns to the question of *Thibodaux* abstention. In *Thibodaux*, the Supreme Court instructed that federal district courts should abstain from adjudicating matters before them where: (1) jurisdiction is predicated solely on diversity; (2) the case involves an unsettled question of state law; and (3) the subject matter of the unsettled question implicates important state interests. *Thibodaux*, 360 U.S. at 28-30. Stated a little differently, "[a]bstention is ... appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public

[34]Plaintiffs may assert that a decision on Plaintiffs' Emergency Motion for the Appointment of a Receiver implicates important federal interests in that a failure to address Defendants' defaults under the Indentures (and enforce the contractually agreed-upon remedies) would have a negative effect on the entire national municipal bond industry. But such an argument would cut no ice at all. No *evidence* has been presented to the court suggesting that a failure to appoint a non-rate making receiver would have any effect on a federal interest. At most, based upon the information before the court, it may well be that decision in this case could have an effect on municipal bond market within the State of Alabama itself. However, even that conclusion is speculative based upon the lack of evidence now before the court.

import whose importance transcends the result in the case at bar." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). Obviously, the first question the court must address is whether *Thibodaux* applies here. To be sure, Plaintiffs contend it does not. Their arguments on this issue are off the mark.

In *Thibodaux*, the Supreme Court upheld a district court's *sua sponte* decision to abstain from deciding a plaintiff's challenge to the City of Thibodaux's exercise of its eminent-domain power. *Id.* at 25-28. The district court determined that a pertinent state statue appeared in conflict with a Louisiana Attorney General's opinion and stayed the case pending the result of a declaratory judgment suit in Louisiana state courts (which at the time had not yet been filed).[35] *Id.* at 30. Reversing the Fifth Circuit, the Supreme Court held that "[t]he District Court was ... exercising a fair and well-considered judicial discretion in staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana." *Id.* at 30. The Court emphasized that abstention "does not constitute abnegation of judicial duty," but rather is "a wise and productive discharge of it." *Id.* at 29.

The Supreme Court "has continued to cite *Thibodaux* approvingly." R. FALLON, ET AL., HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM, at 1211 (5th ed. 2003) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350 (1989)). So have lower federal courts. Writing for the *en banc* Fourth Circuit, for instance, Judge Widener described *Thibodaux* abstention this way: "[T]he *Thibodaux* abstention doctrine ... is applied when there is no federal claim and there is a

---

[35]When it issued its opinion, the Supreme Court assumed that the parties would initiate the state-court suit after remand. *Thibodaux*, 360 U.S. 30-31.

significant and difficult question of state law that concerns matters which are particularly within the province of the state-sovereign to regulate or decide." *Pamponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1325 (4th Cir. 1994) (*en banc*), *overruled on other grounds by Quackenbush*, 517 U.S. 706.

Like other abstention doctrines, *Thibodaux* abstention is founded on principles of federalism. It is grounded in a healthy "regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." *Thibodaux*, 360 U.S. at 25. The *Thibodaux* Court found that eminent domain was "intimately involved with sovereign prerogative" of the city. *Id.* at 28.

Plaintiffs attempt to distinguish *Thibodaux* on three grounds. (Doc. #86 at 21). Each of those arguments misfire.

First, Plaintiffs emphasize the fact that *Thibodaux* itself involved "an uninterpreted state law with a directly conflicting Attorney General opinion." (*Id.*). Indeed that was an important aspect of that case, but the court is not aware of any decision or commentary that purports to limit *Thibodaux* or its rationale to those precise facts. Further, the conflict between the statue and the attorney general opinion was merely indicative of the "quandary" in which the *Thibodaux* district court found itself concerning the meaning of Louisiana law. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959).

Second, and according to them "more importantly," Plaintiffs assert that *Thibodaux's* rationale applies *only* to cases involving eminent domain, which Plaintiffs call a "distinct purview of the state." (Doc. #86 at 21). That assertion is plainly in error. It cannot be argued that eminent

domain is more the "distinct purview of the state" than is the assignment and distribution (per the State's founding charter) of regulatory responsibility between state and local governments.[36]

Finally, Plaintiffs cite *Meredith v. Winter Haven*, 320 U.S. 228 (1943), and *McNeese v. Board of Education*, 373 U.S. 668 (1963), for the proposition that uncertainty in state law is not alone sufficient to justify *Thibodaux* abstention. But that argument is wide of the target also because it only gets Plaintiffs halfway home. *Thibodaux* itself acknowledged both *Meredith* and the uncontested proposition that Plaintiffs assert here – that uncertainty in state law alone is insufficient to trigger the application of *Thibodaux*. *See Thibodaux*, 360 U.S. at 24-25 & n.2. But *Meredith* and *McNeese* can be distinguished from *Thibodaux* – and this case – because the former cases did not involve uncertainty in an area that implicates important state interests. In *Thibodaux* and here, the

---

[36]Moreover, the Supreme Court's own cases make clear that eminent domain is *not* the controlling criterion in applying *Thibodaux* abstention. For example, in *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), a case decided the same day as *Thibodaux*, the Court declined to require abstention in an eminent-domain case. Justice Stewart, one of only two Justices in the majority in both *Thibodaux* and *Mashuda*, explained the distinction:

> In *Mashuda* the Court holds that it was error for the District Court to dismiss the complaint. The court further holds in that case that, since the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication.

Thibodaux, 360 U.S. at 31 (Stewart, J., concurring). In a later decision, the Supreme Court specifically reaffirmed both of the distinctions drawn by Justice Stewart, citing his *Thibodaux* concurrence for support. *See Quackenbush*, 517 U.S. at 717 (observing that *Thibodaux* applies in "cases raising issues intimately involved with the States' sovereign prerogative, the proper adjudication of which might be impaired by unsettled question of state law"); *id.* at 721 ("Unlike in *Thibodaux*, however, the District Court in [*Mashuda*] had not merely stayed adjudication of the federal action pending the resolution of an issue in state court, but rather had dismissed the federal action altogether. Based in large measure on this distinction, we reversed.") (punctuation, quotations, and citations omitted).

uncertainty related to important questions involving "the apportionment of governmental powers between City and State." *Id.* at 28. Just as *Thibodaux* involved the important state interest of the exercise of eminent domain, this case also clearly implicates important matters that are particularly within the province of the state-sovereign to regulate – namely, questions of Alabama law (including Alabama constitutional law) that address how Jefferson County's vested authority over its Sewer System relates to the sovereign prerogatives of the State.

Plaintiffs cannot dismiss *Thibodaux* either by pointing to factual distinctions that make no difference or by attempting to "creatively" limit its scope. Subsequent Supreme Court precedent makes clear that *Thibodaux* applies "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at bar." *Colorado River*, 424 U.S. at 814.

As discussed above, jurisdiction in this matter is based solely on diversity so the real question becomes this – are there a number of *unsettled* questions of state law, which implicate important state interests that this court would be required to decide if it were not to abstain. The court finds that there are. By way of example only, and without limitation, if the court were to assume jurisdiction, it would be called upon to answer the following important questions that involve the State of Alabama's sovereign prerogative:[37]

1. Can anyone other than Jefferson County's governing body set the County's sewer rates consistent with Amendment 73 to the Alabama Constitution?

2. Can the County's seemingly exclusive ratemaking authority be contracted away?

---

[37]Some of these questions also implicate the Johnson Act's prohibition against a federal court (and in this case a federally appointed receiver) directly or indirectly affecting utility rates.

3. Could a federally appointed receiver determine what rate is "reasonable' by reference to existing Alabama law?

4. Could a federally appointed receiver seek a determination of what are reasonable rates?

5. Could a federally appointed receiver negotiate with others on behalf of the County regarding a solution to the current financial crisis?

6. Could a federally appointed receiver lobby (on behalf of the County) the Alabama Legislature to pass legislation which would provide additional sewer revenue (*e.g.*, a sales tax that benefits the sewer system)?

7 What limits, if any, would a federally appointed receiver have in "manag[ing], operat[ing], control[ing], and administer[ing]" Jefferson County's sewer system? *See* Amendment 73 to the Alabama Constitution.

8. Does Alabama Code Section 6-5-20 require Plaintiffs to have presented their claims in equity for an appointment of a receiver to the County Commission prior to the filing of this suit?

A lengthy discussion about each of these questions is unnecessary. However, by way of example, the court will address the last two questions in reverse order.

Alabama Code section 6-5-20 requires that "[a]n action must not be commenced against a county until the claim has been presented to the county commission, disallowed, or reduced by the commission and the reduction refused by the claimant." *Ala. Code* § 6-5-20. Plaintiffs did not present this claim to the Jefferson County Commission prior to filing suit, but argue that presentment was not required under Alabama Code Section 11-28-6. That section excuses presentment on claims based upon Warrants "in the aggregate amount of such warrants and the interest thereon, against such county and against any pledged funds pledged for the payment of the principal of and interest on such warrants, ..." *Ala. Code* § 11-28-6.

The complexity and significance of these issues, and the unsettled nature of Alabama law, is evident upon an examination of the parties' respective arguments. The County asserts that Plaintiffs have not raised the type of claims for which the statutory language excuses presentment because here they seek to enforce rights under the Trust Indenture governing the issuance of the Warrants. Specifically, they seek, *inter alia*, the appointment of a receiver and specific performance of the County's obligations under the indenture. Plaintiffs counter by arguing that the Warrants were issued pursuant to the Trust Indenture and certainly the County should have been on notice that potential plaintiffs would seek to enforce contractual remedies in the event of default.

There are no Alabama cases analyzing § 11-28-6, which Plaintiffs contend excuses their failure to present the claims in this case. There are numerous cases analyzing § 6-5-20. "The purpose of the requirement that the claim filed pursuant to § 6-5-20 be 'itemized' is ... 'to provide county governing bodies with notice of claims against the county and an opportunity to audit and investigate the claims ... .'" *Helms v. Barbour County*, 914 So.2d 825, 829 (Ala. 2005) (quoting *Elmore County Commission v. Ragona*, 540 So.2d 720, 723 (Ala. 1989)). Allowing Counties the opportunity to receive notice of claims and the opportunity to investigate those claims is an important state interest. Further, the itemization provision does not merely require vague notice of a potential claim. Rather, it should be read to require inclusion of "'a factual background, a description of the event or transaction giving rise to the claim, the alleged basis for the county's liability for damages resulting from the event or transaction, the nature of the damages, and the compensation demanded ... .'" *Helms*, 914 So.2d at 829 (quoting *Ragona*, 540 So.2d at 723). The dearth of authority on this issue convinces the court that the Alabama state courts should be given the opportunity to address this issue before a federal court sitting in diversity. This unsettled issue

of state law regarding a fundamental prerequisite to the entire lawsuit, which affects an important state interest, renders abstention appropriate under *Thibodaux*.

Another significant and complex question of state law presented here involves Amendment 73 to the Alabama Constitution. Amendment 73 to the Alabama Constitution states:

> The governing body of Jefferson county shall have full power and authority to *manage, operate, control and administer* the sewers and plants herein provided for and, to that end, may make any reasonable and nondiscriminatory rules and regulations fixing rates and charges, providing for the payment, collection and enforcement thereof, and the protection of its property.

Ala. Const. Amend. 73 (emphasis added). Plaintiffs seek the appointment of a receiver under the Indenture which provides that "[t]he Trustee shall be entitled ... with respect to an Event of Default, . . ., to the appointment of a receiver *to administer and operate* the System, ..." Indenture Section 13.2(c). Thus, in the Indenture, the County promised that, in the event of a default, Plaintiffs would be entitled to powers granted to the County under an Amendment to the Alabama Constitution. There are no state law cases analyzing or interpreting this provision of Amendment 73.

Plaintiffs argue that the vesting of the "full power and authority to manage, operate, control and administer the sewers" would include the authority to delegate that duty under contract and cite *City of Bessemer v. Bessemer Waterworks*, 152 Ala. 391, 44 So. 663 (Ala. 1907) for that proposition. Contrary to Plaintiffs' assertion, *City of Bessemer v. Bessemer Waterworks* is not directly on point, and does not clearly establish the County's "authority to delegate its power to a receiver." In that case, the City did not delegate its duty to set rates, but rather contracted to an agreed upon maximum rate for a certain period of time. That is, rather than delegating the authority to set rates, the City of Bessemer had input into the rates to be charged for that period of time. They were just set by contract. Thus, there exists another unsettled issue of state law, this time regarding a constitutional

grant of power, which affects an important state interest. Thus, *Thibodaux* counsels in favor of abstention with respect to this aspect of the case.

Plaintiffs also cite *Jefferson County Commission v. ECO Preservation Servs., LLC*, 788 So. 2d 121 (Ala. 2000), for the proposition that Amendment 73 does not give the County Commission "the *exclusive* right to maintain a sewer system in Jefferson County." (Doc. #74 at 17). In *ECO*, the County Commission denied a permit to ECO to build its own private sewer that passed through Jefferson County. *ECO*, 788 So. 2d at 123. The issue was simply whether anyone other than Jefferson County itself could operate a sewer within the County's borders. *Id.* at 127. On that question, the Alabama Supreme Court held that Jefferson County's right to operate a system was not exclusive. *Id.* The Court thus allowed private parties to operate their own sewers, but it certainly did not hold – or even suggest – that private parties can set rates or otherwise interfere with the County Commission's exclusive control over *Jefferson County's public sewer*. Plaintiffs can build their own sewer, to be sure. But *ECO* says nothing about the issue before this Court: whether anyone other than the County Commission can *fix rates* for Jefferson County's sewer consistent with Amendment 73.

After carefully reviewing the record and the relevant case law, the court concludes that this question – like the issue of presentment under Section 6-5-20 – is not only complex and unsettled under Alabama law, but also implicates important and substantial sovereign-state issues. Therefore, it is appropriate and advisable for the court to abstain from addressing it.

2. Should the Remaining Claims Be Stayed?

Although *Thibodaux* dictates that this court should abstain from deciding whether Plaintiffs are entitled to the appointment of a receiver, that does not end this case. In addition to seeking a

receiver, Plaintiffs have also sued for a breach of contract. Furthermore, Defendants have asserted counterclaims of Negligence, Breach of Contract, and Fraud and Suppression which also remain pending. Nevertheless, the court's decisions – that (1) it lacks jurisdiction to appoint a rate-making receiver and (2) should abstain from appointing a receiver without rate-making authority – raise a very practical concern. Will continuing this case foster piecemeal litigation? The Supreme Court has "held that federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,'" where denying a federal forum would clearly serve an important countervailing interest, ... for example, "'wise judicial administration.'" *Quackenbush*, 517 U.S. at 716 (quoting *Colorado River*, 424 U.S. at 817 (quoting *Mashuda*, 360 U.S. at 189)).

The question remains whether in abstaining, the court should dismiss or merely stay the case. The primary relief sought in this case is equitable in nature. Where the relief sought is equitable in nature, dismissal is appropriate. *Quackenbush*, 517 U.S. at 721. However, in Count VII of the Complaint, Plaintiffs seek money damages for breach of the Standby Warrant Purchase Agreement, a remedy at law. Further, in their Counterclaims, Defendants seek money damages. "[W]hile [the Supreme Court has] held that federal courts may stay actions for damages based on abstention principles, [they] have not held that those principles support the outright dismissal or remand of damages actions." *Id.* Thus the appropriate course of action is for this court to stay this action and allow Plaintiffs the opportunity to seek review[38] of their claims in the Alabama state courts, which are not limited by the Johnson Act and would have the power to award them *all* of the relief they seek, if such court found it appropriate. "[A]n order merely staying the action 'does not constitute

---

[38]Given the circumstances of this case, as already indicated, if Plaintiffs desire, the court will work with the parties to examine whether an interlocutory appeal is appropriate now.

abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition.'" *Quackenbush*, 517 U.S. at 721 (quoting *Thibodaux*, 360 U.S. at 29). Accordingly, the court requests that the parties confer and, within fourteen (14) days, file a joint report stating whether the court should: (1) stay this case, in whole or in part, so that they can litigate the issue of appointment or a receiver in state court; (2) allow the parties to continue to litigate the remaining issues in this court; or (3) discuss with the parties some other approach.

IV. Conclusion

For the reasons outlined above, the court finds (1) that the Johnson Act deprives it of jurisdiction to appoint a receiver with ratemaking authority, (2) abstention on the issue of whether to appoint a receiver without ratemaking authority is appropriate, and (3) the court has the discretion to stay the remaining aspects of the case in order to foster "wise judicial administration" and, if the parties so desire, avoid piecemeal litigation.

Within fourteen (14) days, the parties shall file with the clerk of the court a joint report stating whether they desire that the court: (1) stay the case, so that they can seek relief in a court that could provide full relief on all claims asserted; (2) continue to litigate the remaining issues in this court; or (3) discuss with the parties some other approach. The court will enter a separate order once it receives a report from the parties.

DONE and **ORDERED** this 12th day of June, 2009.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE